Office-Supreme Court, U.S.
FILED
JUN 26 1981
ALEXANDER L. STEVAS,
CLERK

80-1995

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TEAMSTERS LOCAL UNION NO. 115,
a/w International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, HADDON HOUSE
FOOD PRODUCTS, INC., FLAVOR DELIGHT, INC.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the National Labor Relations Board is authorized to issue a bargaining order to remedy an employer's "outrageous" and "pervasive" unfair labor practices which have prevented the union from attaining majority status.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Haddon House Food Products, Inc. and Flavor Delight, Inc., file this Brief in Opposition to Petitioner's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on January 26, 1981, which denied a petition to review an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 641 F.2d 984. [App. B1-B24]*

The decision and order of the National Labor Relations Board, dated June 12, 1979, is reported at 242 NLRB No. 180. [App. C1-C61].

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1981. The Court of Appeals denied the Union's petition for rehearing and petition for rehearing *en banc* on February 28, 1981. The Petitioner's petition for writ of certiorari was served on Respondents on May 27, 1981. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

APPLICABLE STATUTORY PROVISIONS

Section 7 of the National Labor Relations Act [29 U.S.C. Section 157] (hereinafter referred to as "the Act") provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

*References to Petitioner's Appendix appear in brackets.

Section 8(a)(1) of the Act [29 U.S.C. Section 158(a)(1)] provides:

> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Section 10(c) of the Act [29 U.S.C. Section 160(c)] provides, in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.

STATEMENT OF THE CASE

Respondent, Haddon House Food Products, Inc. (hereinafter referred to as the "Employer"), is a New Jersey corporation engaged in the wholesale distribution of food products. Ancillary aspects of the Respondent's business include the warehousing and delivery of its products to food stores, department stores, delicatessens and various other distributors of its products. Respondent, Flavor Delight, Inc. (hereinafter referred to as the "Employer"), is a New Jersey corporation engaged in the manufacture and packaging of a line of seasonings and spices which are marketed by Respondent Haddon House. Haddon House and Flavor Delight occupy adjoining premises in Medford, New Jersey.

The Petitioner, Teamsters Local Union No. 115 affiliated with the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "the Union"), began organizing the employees of the Employer on November 13, 1975.[1] Several of the Employer's employees signed union authorization cards on the 13th and on November 17, Teamster business agent Joseph Yeoman presented himself at the Employer's offices demanding that the Employer recognize and bargain with the Union.

Prior to the Union's demand for recognition, the Employer discharged and laid-off a number of employees.

An Administrative Law Judge (hereinafter referred to as the "ALJ") of the National Labor Relations Board (hereinafter referred to as the "Board") found that the Employer was guilty of numerous unfair labor practices stemming from the discharges and layoff referred to above. Although the ALJ found that the Union had never obtained authorization cards from a majority of the employees in the petitioned-for bargaining unit, he recommended that the Board issue a bargaining order based upon his finding that a fair election could not be held among the Employer's employees in the foreseeable future. The Board accepted the ALJ's findings of unfair labor practices, but declined to issue the recommended bargaining order. However, in addition to its standard remedies, the Board ordered a variety of alternative remedies, which included the following extraordinary mandates:

> 1. Ordering the Employer to grant the Union and its representatives, upon request, reasonable access to company bulletin boards and all places where notices to employees are customarily posted for a period of two (2) years;
>
> 2. Ordering the Employer to grant the Union, upon request, reasonable access to its plant in non-

1. All dates herein refer to 1975, unless otherwise indicated.

work areas during employees' non-work time for a period of two (2) years;

3. Ordering the Employer to give notice of, and equal time and facilities for the Union to respond to, any address made by the Employer to its employees on a question of Union representation for a period of two (2) years;

4. Ordering the Employer to afford the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled in which the Union is a participant for a period of two (2) years.

The Union and the Employer each petitioned for review of the Board's order to the United States Court of Appeals for the District of Columbia Circuit and the Board cross-petitioned for enforcement. The Court generally upheld the Board's findings, specifically affirming the Board's decision not to issue a bargaining order.

The United States District of Columbia Circuit Court of Appeals, on February 28, 1981, in a *per curiam* order, denied the Union's petition for a rehearing and petition for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

It is well settled that the Board has broad discretion to fashion remedies in unfair labor practice cases. Historically, the Board has never issued a bargaining order absent a showing that at some time the union enjoyed the support of a majority of the employees in the unit the union sought to represent. Consistent with its past practice, the Board was unwilling to order such relief in this case. It is important to note that this Court has considered the question presented by the Union once before and indicated that the Board's discretionary power to fashion remedies encompasses a minority-

based bargaining order. *NLRB v. Gissel Packing Company*, 395 U.S. 575 (1969). Apparently, the Board has not found it appropriate to circumvent the fundamental principle of majority rule. The Appellate Court in the instant case concluded in its decision below:

> . . . For a government body to bypass the employees altogether, and impose a bargaining representative merely on the basis of its own assessment of the employees' needs, would pose a serious threat to employee freedom of choice. [App. B11]

Additionally, the Appellate Court found that

> The Board has sufficiently articulated its conclusion that, whether or not this remedy may be justified in some hypothetical situation, the majority of the Board agrees it is *not appropriate* in this case. (Emphasis supplied) [App. B11]

Contrary to the Union's assertion, the decision of the Court of Appeals for the District of Columbia Circuit is not in conflict with the decision of the Court of Appeals for the Third Circuit styled *United Dairy Farmers Cooperative Association v. NLRB*, 633 F.2d 1054 (3rd Cir. 1980). In *United Dairy Farmers*, a case involving a systematic pattern of premediated unfair labor practices, the Court remanded the case to the Board to determine if the unfair labor practices committed were, in fact, so "outrageous" and "pervasive" that a bargaining order should issue in the absence of a card majority. In the instant case, the District of Columbia Circuit did not hold that the Board lacked the authority to issue a minority-based bargaining order as the Union contends. The Court agreed with the Board that although this remedy may be appropriate in some instances, it would not be appropriate in this case. Since the appellate decisions in both the instant matter and *United Dairy Farmers* are not in conflict, the issue the Union puts before this Court cannot be subject to further review.

United Dairy Farmers, as noted, involved extensive unfair labor practices which were viewed against a background of similar violations in two previous anti-union campaigns waged by the employer. In the instant case, the Employer found itself in violation of the Act for the first time. Under the most stringent examination of the factual holdings determined herein, the issuance of a minority-based bargaining order would be clearly inappropriate.

The Union cites an extensive list of court decisions and legal articles written by a diversified range of commentators who have purportedly accepted the Third Circuit's analysis of *Gissel* in *United Dairy Farmers*. However, each commentator and each court decision cited concur that the Board is empowered to issue a bargaining order *only* when there is clear evidence that a majority of employees in the petitioned-for bargaining unit desire union representation or the facts indicate that a free and fair election cannot be held in the future. *See*, Comment, United Dairy Farmers Cooperative Association: *NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-Union Majority*. 80 Columbia Law Review 840 (1980). All the cited authorities agree that because a bargaining order is "strong medicine" and because there exists reasonable doubts as to its efficacy and propriety in situations where the employer's pervasive unfair labor practices impede the union from acquiring a majority in the appropriate bargaining unit, its implementation should be limited to extraordinary cases. *See*, Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union has Never Attained a Majority*, 29 Labor Law Journal 631 (1978). The facts in the instant case do not approach such a standard.

Moreover, the Board decided in the instant case that the imposition of a bargaining order would not effectuate the policies of the Act because the union did not demonstrate that it had ever held the support of a majority of

the Employer's employees. As this Court has stated, "It is for the Board and not the courts . . . to make [the] determination whether to issue a bargaining order." *NLRB v. Gissel Packing Company, supra*, 395 U.S. at 612, n. 32. *See, NLRB v. International Meat Specialties, Inc.*, 433 F.2d 870, 872 (2nd Cir. 1970) (the Board has "almost total discretion to determine when a bargaining order is appropriate").

The Board's refusal to issue a bargaining order in this instance, a case where the majority of employees have never indicated a preference for a union, is consistent with the policies of the Act, and "well within the range of respect traditionally to be accorded by [courts] to the Board's determinations." *Food Store Employees, Local No. 347 v. NLRB*, 476 F.2d 546, 550 (D.C. Cir. 1973), *reversed on other grounds*, 417 U.S. 1 (1974).

This Court should deny the Union's petition because of the great deference granted to the Board in fashioning appropriate remedies. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). The Act's fundamental policy is to effectuate majority rule in the selection of a collective bargaining representative. Section 7 of the Act guarantees employees the right to engage in or refrain from engaging in collective bargaining. In the instant case, a majority of the employees have never, at any time, indicated that they desire union representation. To the contrary, it is quite possible that a majority of the present employee complement freely oppose unionization. In this respect, employee turnover and the passage of time since the commission of the Employer's unfair labor practice are factors which the Board should consider in fashioning an appropriate remedy. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 214 (2nd Cir. 1980). In this regard, it should be noted that the Board's order was issued four years after the initial unfair labor practice charge was filed by the Union.

To date, the Employer has not been charged with any additional violations of the Act. In these circumstances, it seems eminently reasonable that the Board, exercising its responsibility under Section 10(c) of the Act, declined to trample upon the principle of majority rule found in Section 7. In the past, this Court has given great deference to the majority-rule principle. In *ILGWU [Bernhard-Altman] v. NLRB*, 366 U.S. 731 (1961), this Court found a violation of Section 8(a)(2) of the Act when the employer, in good faith, granted recognition to a minority union. This Court found that allowing such recognition would frustrate the employees' freedom of choice and destroy majority rule in the selection of a representative. In light of that decision, and the principle of majority rule which it affirms, it would indeed be an anomaly for this Court to grant a petition which could result in undermining the basic principle of majority rule which is the central thrust of the Act.

In addition, certiorari is inappropriate in this case because there is no conflict between the Third Circuit and the District of Columbia Circuit on the question presented by the Union.

CONCLUSION

For the reasons above stated, we respectfully urge that Petitioner's Writ of Certiorari be denied.

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